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In the Supreme Court of the United States

OCTOBER TERM, 1960

NO. 560

B. H. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington,
Petitioner,

v.

HENRY M. GRIFFITH, *Respondent.*

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN J. O'CONNELL,
Attorney General of the State of Washington,

STEPHEN C. WAY,
Assistant Attorney General,

Attorneys for petitioner.

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HENRY M. GRIFFITH, *Respondent.*

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

The Attorney General of the State of Washington on behalf of the petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on September 12, 1960.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Washington is reported at 177 F. Supp. 386, a copy of that opinion is found in the Appendix at page 50. The opinion of the United States Court of Appeals for the Ninth Circuit is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on September 12, 1960 and a copy of that opinion and the judgment is appended to this petition in the Appendix at page 35 and 33.

On October 3, 1960, the petitioner filed in the United States Circuit Court of Appeals for the Ninth Circuit, a Motion for Stay of Mandate which motion was granted on October 7, 1960, staying the mandate of the Circuit Court of Appeals until December 10, 1960, unless the petitioner should make application to the above-entitled court for a writ of certiorari, whereupon the mandate is stayed until final disposition by this court. A copy of the Order of the United States Circuit Court of Appeals for the Ninth Circuit staying its mandate is appended to this petition in the Appendix at page 34.

The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The respondent filed a petition for a writ of habeas corpus in the Supreme Court of the State of Washington on May 25, 1959, alleging, *inter alia*, that the restraint of his liberty by the petitioner was in violation of the "due process" clause of the Fourteenth Amendment of the Constitution of the United States, on the grounds that he was without the assistance of counsel at the time of giving a

confession relating to the crime of which he was convicted. The petition was summarily denied by the Supreme Court of Washington on June 1, 1959. The respondent petitioned the Supreme Court of the United States for a writ of certiorari which was denied. *Griffith v. Rhay*, 359 U. S. 1015. Rehearing denied 360 U. S. 941.

Thereafter, the respondent filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Washington alleging among other things that he had been denied "due process of law" on the grounds that he was without the assistance of counsel at the time of giving a confession relating to the crime of which he was convicted. The District Court denied the petition for a writ of habeas corpus in an opinion which is appended hereto in the Appendix at page 67. The respondent timely appealed the judgment of the District Court to the United States Court of Appeals for the Ninth Circuit which reversed the judgment of the District Court for the reason that,

> "Under the circumstances of this case, the reception in evidence of a signed confession based on questioning conducted while Griffith was without the assistance of counsel and, at a time when he had not declined such assistance, deprived him of 'due process of law' within the meaning of the 14th Amendment." (Appendix page 49.)

The Circuit Court of Appeals also stated in the course of its opinion as follows:

"The rule announced in *Crooker* refers to circumstances in which a defendant has requested counsel and such request has been refused. In our opinion, however, Griffith is to be regarded as in the same position as one who has made and been denied such a request." (Appendix page 48.)

The questions presented are:

1. Whether the Circuit Court of Appeals for the Ninth Circuit erred in concluding that, under the circumstances of this case, the respondent, Griffith, who (1) had been informed prior to interrogation that any statement he might make could be used against him, and who (2) made no request for the assistance of counsel before or during interrogation, was deprived of due process of law by the admission at trial of a confession obtained during this interrogation.
2. Whether the Circuit Court of Appeals for the Ninth Circuit erred in assuming for the purpose of arriving at its decision that the respondent, who made no request for counsel during interrogation, is to be considered as being in the same position as one who has made and been denied a request for the assistance of counsel.
3. Whether the Circuit Court of Appeals for the Ninth Circuit erred in concluding that the respondent, although informed that "* * * anything you say can be used against you," had not been advised prior to the pre-arraignment interrogation of October 11, 1956 of a right to remain silent and not to submit to such interrogation.

STATUTES INVOLVED

R. C. W. 10.40.010. "When the indictment or information has been filed the defendant, if he has been arrested, or as soon thereafter as he may be, shall be arraigned thereon before the court."

R. C. W. 10.40.030. "If the defendant appear without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and he shall be asked if he desire the aid of counsel, and if it appear that he is unable to employ counsel by reason of poverty, counsel shall be assigned to him by the court."

R. C. W. 10.01.110. "Whenever a defendant shall be arraigned upon the charge that he has committed any felony, and shall request the court to appoint counsel to assist in his defense, and shall by his own oath or such other proof as may be required, satisfy the court that he is unable, by reason of poverty, to procure counsel, the court shall appoint counsel, not exceeding two, for such defendant, to be paid upon its order by the county in which such proceeding is had, compensation not exceeding twenty five dollars per day for each counsel, for the number of days such counsel is actually employed in court upon the trial and twenty five dollars for services in preparing for trial or plea."

STATEMENT OF THE CASE

Henry M. Griffith, the respondent, is held in the custody of the petitioner, the Warden of the Washington State Penitentiary at Walla Walla, Washington, under sentence of death upon his conviction by a jury of the crime of murder in the first degree.

The basic facts giving rise to the questions presented are:

On October 4, 1956, A. B. Davis of Lind, Washington, was shot to death in a field near the city under circumstances which indicated murder. An investigation of the circumstances of the murder led to the giving of a state alarm for the apprehension of the respondent, Griffith, as the suspected murderer.

The respondent was found about 11:30 p.m. on October 6, 1956, lying on the shoulder of a street in the City of Spokane, Washington suffering from a self-inflicted bullet wound in the abdomen. The Spokane County Sheriff's Office was notified, and shortly thereafter, Deputy Sheriff Warren Adams and two other deputies arrived on the scene. After some preliminary conversation with Griffith, leading to his identification as the person suspected of the murder of A. B. Davis, Griffith, in response to questions put by Adams readily admitted having shot and killed A. B. Davis near Lind, Washington. Adams accompanied Griffith in the ambulance to the Sacred Heart Hospital in Spokane, and enroute,

Griffith again admitted that he had shot and killed A. B. Davis, and gave his reasons for doing so.

At the trial, objection was made by counsel for Griffith to the admission in evidence of the testimony of Adams relative to the two admissions. In the absence of the jury, offers of proof were made by the Prosecuting Attorney as to what Adams' testimony would be if allowed to testify. In support of the motion to suppress Adams' testimony, Griffith's counsel called Griffith to the witness stand, and he testified in substance that he had no recollection of having made the admission. No other testimony or evidence was submitted on the motion to suppress, and the court ruled that "it would be denied as to this particular confession." Adams was then recalled as a witness before the jury, and gave testimony relating to the two admissions made by Griffith that he had shot and killed A. B. Davis and further testified as to the reasons Griffith gave for having killed his victim. Adams also testified, in substance, that at the scene of the self-inflicted bullet, Griffith stated he was not in great pain and that Griffith responded to questions freely and was coherent at all times. No testimony or evidence was submitted by Griffith before the jury in an attempt to controvert Adams' testimony and there was no action by the court preventing him from doing so.

At the time of Griffith's apprehension, he was approximately one month short of being twenty years of age, having been born on November 1,

1936 in Castlerock, Washington. Griffith is the oldest of a family of four boys. During the greater part of Griffith's childhood, his mother and father had lived separately and the father contributed very little to the support and welfare of his family. In 1941, the respondent's mother suffered a nervous breakdown and was committed to the Western State Hospital, an institution for the mentally ill, and was discharged from that institution in 1944. Shortly after Griffith s mother was committed to the Western State Hospital, he was made a ward of the Washington Children's Home and remained at that home until 1942 at which time custody of Griffith and the other children were taken by the maternal grandmother of Griffith in whose custody he remained until 1945 living in Bellingham, Washington. In 1945 the mother again assumed the custody and supervision of her children and they lived in a rented home in Bellingham and received aid in their support from the State Welfare. In 1948, Griffith went to live with his paternal grandmother and grandfather in Spokane and remained with his paternal grandparents until 1950 at which time he returned to the home of his mother in Bellingham, Washington. In September of 1951, Griffith was committed by the Juvenile Court, as a result of a burglary offense, to the Washington State Training School for Boys at Chehalis where he remained until May of 1952. Shortly thereafter, he was returned to the Washington State Training School for Boys by order of the Juvenile Court in

July of 1952 as a result of a forgery offense and he remained at the training school in Chehalis until April of 1953 at which time he was paroled to the custody of his father in Tacoma. The respondent stayed with his father two or three months and then ran away to live with a Mr. and Mrs. Dean in Tacoma and he lived with them two or three weeks. Thereafter, Griffith joined the Army and after three months of boot training, went AWOL and shortly thereafter received an undesirable discharge from the Army. Shortly after his release from the Army he was convicted of the crime of forgery in the first degree and sentenced to a term of confinement at the Washington State Reformatory, and served a period of confinement in that institution from January 1955 to April of 1956. Upon Griffith's parole from the Washington State Reformatory he went to live with his paternal grandparents in Spokane and remained with them until October 4, 1956, the date of the murder of A. B. Davis.

It does not appear in the record as to whether or not Griffith completed a high school education; however, it does appear that while residing with his paternal grandparents in Spokane that he did attend high school.

The District Court in its Opinion 177 F. Supp. 386, a copy of which is found in the Appendix at page 50 characterized the background of Griffith, which is also quoted in the Opinion of the Circuit Court of Appeals as follows:

> " * * * he had received little formal education. His childhood was unhappy and insecure. His stay in foster homes was necessary because his father abandoned the family and his mother suffered a nervous breakdown, requiring her hospitalization. He was in the army and went AWOL after boot training. He was sent to the state reformatory for forgery, and was on parole from that institution when he was arrested and charged with the crime of which he now stands convicted. The emotional instability of petitioner is shown by the testimony of his witnesses at the trial."

In the early morning hours of October 7, 1956, emergency surgery was performed on Griffith at the Sacred Heart Hospital in Spokane as a result of the self-inflicted bullet wound in the abdomen, which surgery required from three and one-half to four hours to perform. Griffith's condition was characterized as being critical during the whole of the day of October 7, 1956. Following the operation a catheter was placed in his bladder to keep it drained. A tube was placed in his nose to empty stomach secretions. Oxygen was administered and during the course of the operation and shortly thereafter Griffith received a transfusion of five pints of blood. Nourishment was administered to Griffith intravenously, and he was also given a drug known as Demerol as a sedation, in the amounts and at the times as described in the Circuit Court of Appeals opinion. (Appendix page 40.)

With the permission of Griffith's attending physician, Dr. Albi, Griffith was interrogated in

the afternoon of October 7, 1956 by a Deputy Sheriff with the use of a wire recorder. The confession so obtained was later reduced to writing and signed by Griffith two days thereafter and was offered in evidence at the trial but was rejected by the court.

On October 11, 1956 commencing at 2:30 p.m. Griffith gave a confession in response to questioning by the prosecuting attorney of Adams County, in the presence of two deputy sheriffs, and a stenographer who took shorthand notes and later reduced the confession to writing. The typewritten confession was presented to Griffith by a notary public on October 15, 1956 between 4:30 and 5:00 p.m. for his review, the making of any corrections and for his execution under oath.

On October 11, 1956, the date of the confession in question, Griffith was given Demerol at the times and in the amounts, to-wit:

Date	*Amount*	*Time*
10-11-56	75 mgm	3:00 a.m.
	75 mgm	2:25 p.m.
	75 mgm	6:10 p.m.
	75 mgm	9:00 p.m.

On October 15, 1956, the date of the execution of the confession by Griffith before a Notary Public, Griffith was given Demerol at the times and in the amounts, to-wit:

Date	*Amount*	*Time*
10-15-56	75 mgm	6:45 a.m.
	75 mgm	11:40 a.m.
	75 mgm	4:15 p.m.
	75 mgm	9:30 p.m.

Demerol is a narcotic and analgesic drug given for the relief of pain. Its initial effect is felt in five to fifteen minutes after injection, the maximum effect being felt in one-half to two hours after injection. No effect remains after three to three and one-half hours.

The file relating to Griffith kept by the Sacred Heart Hospital indicates that on October 11, 1956, at 11:30 a.m. the appellant received broth and tea and the file further indicates that the broth and tea were taken well and that intravenous feedings were terminated at 2:00 p.m., the respondent was visiting and the respondent had a good day. In the evening of October 11, 1956, Griffith again received broth and tea and the nurses notes indicate that his appetite was good and at 7:00 p.m. he again received visitors. On October 15, 1956, the date of the execution of the confession by Griffith, the progress notes of the Sacred Heart Hospital indicate that the respondent was up and standing.

The questioning of Griffith by the Prosecuting Attorney of Adams County on October 11, 1956 commenced at 2:30 p.m.; five minutes prior thereto, the nurse in attendance administered an injection to Griffith of 75 mgms of Demerol while the Prosecuting Attorney of Adams County and the other persons in his company stepped out of Griffith's hospital room. At the outset of the interrogation of Griffith the Prosecuting Attorney advised Griffith that he was the Prosecuting Attorney from Adams

County, that Griffith was charged with murder in the first degree. Griffith was also advised:

> "* * * And you also understand that anything you say can be used against you?"

Griffith was not advised of a right to retain counsel of his own choosing to advise him whether or not to submit to interrogation, or to give him aid and assistance during the course of the interrogation. Griffith was also not advised at this time, that if he were financially unable to retain counsel to advise him, that the state would provide counsel for him to be paid for at public expense.

The stenographic notes of Griffith's confession of October 11, 1956 were transcribed and the written statement was taken to Griffith on October 15, 1956 between 4:30 and 5:00 p.m. of that day by a Notary Public employed by the Sheriff's Office. The Notary Public found Griffith in bed in a partially elevated position, smoking and reading. He was handed the statement to read for any corrections he desired to make and, thereafter, under oath, signed it.

At the trial, counsel for Griffith made a motion to suppress the confessions, both of October 7 and October 11, 1956 and the court, in ruling upon the motion to suppress stated as follows:

> "The Court: I am ready to pass on the exhibits. In regard to Exhibit 18, it appears identification 18—rather it appears that this

deposition was taken on the 7th, the day following the day following the accident or the shooting, and according to the testimony of both the officer and the nurse, I very likely believe he was under the influence of opiates at that time, and the way the deposition winds up here, he did not even answer the last question. It would be a little questionable whether this was a voluntary deposition or confession, and therefore identification No. 18 will be rejected and not admitted in evidence.

(Whereupon identification No. 18 being a statement of Henry M. Griffith, was rejected and not admitted into evidence.)

"The Court: In regard to identification 19, we have a little different situation. Here the Prosecuting Attorney of Adams County was present, and an experienced man in taking confessions and statements of this nature. It is certain that he would not high pressure the man or do anything that was out of order in connection with taking this deposition. On the morning of the 11th he had no medication at all. Some several days had elapsed since the accident occurred. He must have been over the shock, and his mental capacity at that time I would say was sufficient to give a statement or a confession which could be admissible in evidence. And the same way the statement was signed on the evening of the 15th. It does show that he had some sedative along about 4:30 of that day, but his actions after that length of time, it appears to the Court he was capable and able to give his confession, and No. 19 will be admitted into evidence as Exhibit No. 19 and can be read in the record."

It is to be noted that the trial judge, in his ruling upon the admissibility of the confession of October 11, 1956 stated that Griffith had been given

no medication at all during the morning of October 11, 1956, which is incorrect for he was given 75 mgms of Demerol at 3:00 a.m. However, it is apparent that the trial judge was here relying upon the testimony given by Griffith's attending physician, Dr. Albi, who, in the course of his testimony, stated that Griffith had not received any Demerol during the morning of that day.

While at the hospital, Griffith was guarded but not held incommunicado. He had nurses in attendance upon him, his doctor saw him twice a day. He was often visited by his mother and grandmother who were afforded the opportunity to advise him. At no time during the period in question did Griffith have or request to have the services of an attorney, nor were efforts made to prevent him from seeking the aid and assistance of counsel.

Griffith was charged by an Information filed in the Superior Court of Adams County with the crime of murder in the first degree on October 8, 1956.

At the trial the prosecution in opposition to the motion to suppress the confession of October 11, 1956, presented in evidence the testimony of the two deputy sheriffs and the stenographer who were present at the time of the taking of Griffith's confession and they all testified generally that Griffith was coherent, that they experienced no difficulty in understanding him, that he was aware of where he was and of what was taking place, that he was responsive and readily answered questions.

Counsel for Griffith in support of his motion to suppress the confession of October 11, 1956 called to the witness stand the nurse who gave Griffith his shot of Demerol at 2:25 p.m. of October 11, 1956 and she testified generally that Griffith was drowsy, in quite a bit of pain, not real alert and stated:

> "Henry would shake his head and maybe say 'yes' or 'no' in response to questions and would not answer long questions."

However, both upon the direct examination and in cross-examination, the nurse had no recollection whatsoever of the conversations she had with Griffith at that time.

At the hearing in the District Court in Spokane, both the petitioner and the respondent presented expert testimony on the subject of the effect of Demerol upon Griffith's confession of October 11, 1956. Dr. Olsen, who testified on behalf of the petitioner gave his opinion that the Demerol administered to Griffith had no effect upon the volition, judgment or discretion of Griffith in connection with his having made the confession of October 11, 1956. Dr. Olsen's opinion was not changed by his knowledge of the physical condition which Griffith was in at the time in question. He also testified that his opinion would be no different regardless of the fact that two psychiatrists had diagnosed Griffith as being a psychopathic personality and, in addition, that there had been a history of mental illness in his family. In contrast, the Doctor for the respondent testified that the will of one under the influence

of Demerol is impaired and that its effect is more pronounced on a person suffering from injuries and that psychopathic instincts also accentuate the effect of narcotics.

The trial judge, in his opinion, seems to be somewhat more reliant upon the testimony given by Dr. Albi, Griffith's attending physician who testified in the state court proceedings and, in the course of the District Court judge's opinion, Appendix page 65, the following is found:

> "In further testifying, the doctor stated the indication would be that if answers of persons under the influence of Demerol were normal and responsive, they would be in retention of their mental faculties.
>
> "Q. I mean if their (persons under influence of drug such as Demerol) answers were responsive, that would mean they were in possession of some of their faculties, wouldn't it?
>
> "A. I should think so.
>
> "Q. If they showed a good memory and were able to recall events more or less normally, that would indicate retention of their mental faculties?
>
> "A. I would say if their responses sounded all right, I guess it would. That would be some indication that they were all right I guess."

The Circuit Court of Appeals for the Ninth Circuit, in its opinion summarized its conclusion of the case as follows:

> "We hold that under the circumstances of this case, the reception in evidence of a signed confession based on questioning conducted

> while Griffith was without the assistance of counsel at a time when he had not declined such assistance, deprived him of 'due process of law' within the meaning of the 14th amendment. * * * "

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed for the reason that it decides an important question of "due process of law" which has not been settled by this court.

As we have stated earlier, the Circuit Court of Appeals held

> "that under the circumstances of this case, the reception in evidence of a signed confession based on questioning conducted while Griffith was without the assistance of counsel and at a time when he had not declined such assistance, deprived him of 'due process of law' within the meaning of the 14th Amendment."

It seems clear from the language chosen by the Circuit Court that under the circumstances of Griffith's case, even in the absence of his request for the aid of counsel he had a right under the "due process clause" before interrogation to be advised of a right to employ an attorney of his own choice; that, if he was without funds with which to employ counsel, the state must provide him with an attorney at public expense; and further, that the state could not proceed to interrogate Griffith (assuming the condition of advising of the right to counsel had been fulfilled) without first having obtained a waiver of his right to counsel.

The Circuit Court of Appeals cites and quotes from *Crooker v. California*, 357 U. S. 433, 439-440, 2 L. Ed. 2nd 1448, 78 S. Ct. 1287 apparently as authority, at least in part for its decision. We also quote from *Crooker*, *supra*, and that portion of the opinion which appears within the double parentheses is quoted by the Circuit Court of Appeals in its opinion.

> "We turn now to the contention that even if the confession be voluntary, its use violates 'due process' because it was obtained after denial of petitioner's request to contact his attorney. Petitioner reaches this position by reasoning first, that he had been denied a 'due process' right to representation and advice from his attorney, and secondly, that the use of any confession obtained from him during the time of such a denial would, itself, be barred by the 'due process' clause, even though freely made. We think petitioner failed to sustain the first point, and therefore we do not reach the second.
>
> "The right of an accused to counsel for his defense, though not firmly fixed in our common law heritage, is of significant importance to the preservation of liberty in this country. See 1 Cooley's Constitutional Limitations (8 Ed. 1927) 696-700; 2 Story on the Constitution (4th Ed. 1873) § 1794. That right, secured in State Prosecutions by the 14th Amendment, a guarantee of 'due process', includes not only the right to have an attorney appointed by the state in certain cases, but also the right of an accused to 'a fair opportunity to secure counsel of his own choice'. Powell v. Alabama, 287 U. S. 45, 53 (1932); Chandler v. Fretag, 348 U. S. 3 (1954). Under these principles, state refusal of a request to engage counsel, violates

'due process' ((not only if the accused is deprived of counsel at trial on the merits, Chandler v. Fretag, supra, but also if he is deprived of counsel for any part of the pre-trial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concepts of justice. Lisenba v. California, 314 U. S. 219, 236 (1941). Cf Moore v. Michigan, 355 U. S. 155, 160 (1957). The latter determination necessarily depends upon all the circumstances of the case))."

Cicenia v. LaGay, 357 U. S. 504, 2 L. Ed. 2nd 1253, 78 S. Ct. 1297 also cited by the Circuit Court of Appeals as authority, was decided on the basis of *Crooker v. California, supra* that the petitioner's constitutional rights in that case, were not violated by the New Jersey authorities' refusal to allow the petitioner to contact his attorney during the pre-trial interrogation period.

The Circuit Court of Appeals apparently, in an effort to distinguish *Cicenia v. LaGay, supra*, stated: (Appendix page 47.)

> "In Cicenia v. LaGay, 357 U. S. 504, while the defendant was denied access to his attorney during the period of his questioning, he had previously employed counsel and *was presumably advised of his rights.*"

It should be pointed out that the presumption indulged in by the Circuit Court that the defendant, "was presumably advised of his rights" does not appear to be borne out by the facts recited in this court's opinion in *Cicenia v. LaGay, supra*. The defendant there was advised to give himself up to

the police by his attorney, but there is nothing in the opinion of this court, which indicates or even infers that counsel gave any further advice to the defendant.

It is clear, in the instant case, that Griffith did not, at any time, prior to his appearance before the Superior Court for arraignment, request the assistance of counsel. Therefore, it would seem that, in line with *Crooker v. California*, *supra*, and *Cicenia v. LaGay*, *supra*, that if it is not a violation of a constitutional right to refuse an accused, at the time of pre-trial questioning, the opportunity to communicate with an attorney who had been retained, then, most certainly, it is not a deprivation of "due process" to proceed with a pre-arraignment interrogation of an accused, without advising him of a right to the assistance of counsel when he had not requested counsel.

Manifestly, this court has not yet reached the question of whether or not an accused person has a constitutional right to be advised of a right to the assistance of counsel, either at his own expense, or at the expense of the public treasury at state pre-arraignment criminal proceedings. Therefore, we urge that upon this ground alone, if for no other, the writ of certiorari should issue.

2. Further, we are of the opinion that the Circuit Court of Appeals erred in finding that Griffith had not been advised of a right to remain silent and this finding should be reviewed.

During the course of its opinion the Circuit Court of Appeals stated in part as follows: (Appendix pages 46 and 47.)

> "In our opinion, Griffith was so prejudiced by not having the advice of counsel on the afternoon of October 11, 1956. No one told him at that time that he did not have to submit to interrogation. There is no testimony that he had previously been given this information. Considering his youth and background, it could not reasonably be inferred that Griffith understood that he had the right to remain silent."

At the outset of Griffith's interrogation, on October 11, 1956, he was advised:

> "Q. And you also understand that anything you say can be used against you?
> "A. Yes."

Admittedly, this statement does not pointedly say, you do not have to answer our questions, or submit to our interrogation, but the implication of the statement clearly conveys the thought that he has the right to remain silent, but that if he talks, anything he says may be used against him. The converse of the statement is manifestly implied that you have a right to remain silent and that if you remain silent, nothing can be used against you. Accordingly, we feel that in the minds of reasonable men, the clear import of the statement of the prosecutor was an admonition of the right to remain silent.

3. The petitioner further takes the position that the Circuit Court of Appeals erred in assum-

ing for the purpose of its decision, that Griffith had made and been denied a request for counsel, a fact which was clearly and admittedly by the court, not in evidence, and this we feel should also be reviewed.

On this point the Circuit Court of Appeals, in its opinion stated: (Appendix page 48.)

> "The rule announced in Crooker refers to circumstances in which a defendant has requested counsel and such request has been refused. In our opinion, however, Griffith is to be regarded as in the same position as one who had made and been denied such a request."

4. Finally we respectfully submit that certiorari should be granted for the principle of constitutional law here involved is of vital and recurring importance to not only the enforcement of the criminal law in the State of Washington, but to all criminal law enforcement agencies, both state and federal.

In the State of Washington, as in most states, there is no requirement, statutory or otherwise, that the accused has a right to be advised that he is entitled to the assistance of counsel prior to arraignment. In Washington, at the time of arraignment, the court is required to advise the accused of his right to the assistance of counsel and that, if he is an indigent person, that the court will appoint counsel for him at public expense.

In this respect, RCW 10.40.030 provides:

> "If the defendant appear without counsel, he shall be informed by the court that it is his

> right to have counsel before being arraigned, and he shall be asked if he desire the aid of counsel, and if it appear that he is unable to employ counsel by reason of poverty, counsel shall be assigned to him by the court."

Also see *In re Wilken vs. Squier*, 50 Wn. 2d 58, 309 P. 2nd 746.

In federal proceedings, it appears that although the accused must be advised by the Commissioner at the preliminary proceedings that he has a right to retain counsel, the right does not become a right to be provided with counsel until the accused is brought before the court for arraignment. On this point, Rule 44 of the Federal Rules of Criminal Procedure provides:

> "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."

Indeed, it would be anomalous to say the least, if this court should impose upon the states a rule that an accused is entitled to be provided counsel as a matter of right, prior to arraignment and, in all events, before pre-arraignment interrogation, when, in fact no such rule is applicable in federal proceedings, which this court has power to supervise.

"This Court has often recognized that it is of the 'very essence of our federalism that the States should have the widest latitude in the administra-

tion of their own systems of criminal justice.'" *Cicenia v. LaGay*, 357 U. S. 504, at 510. (1958) This latitude of course will be restricted only in order to prevent a denial of due process. "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisenba v. California*, 314 U. S. 219, at 236 (1941).

This Court has held that confessions made by indigent defendants prior to state appointment of counsel in a capital case may be admitted at trial, and that admitting such a confession is not so fundamentally unfair as to violate due process. *Brown v. Allen*, 344 U. S. 443, 474-476 (1953); *Stroble v. California*, 343 U. S. 181, 196-198 (1952). In the former case, there was evidence in the record that the defendant was informed of his right to remain silent under questioning; in the latter case, there was no such evidence.

This Court has also held that the right to counsel, guaranteed to defendants in state capital cases under the due process clause, is not denied where there is a denial of the defendant's request to consult with counsel, and where the defendant, because of his background, probably knew of his right to remain silent under questioning. *Crooker v. Cali-*

Lynumn, 357 U. S. 433 (1958). This Court has, furthermore, reached the same conclusion in a case presenting substantially the same issues as *Crooker*, but in which there was no evidence that the defendant knew of his right to remain silent. *Cicenia v. LaGay*, 357 U. S. 504 (1958). (The defendant had met with his attorney in order to be advised whether he should turn himself over to the police, but there is no evidence he was advised on any other matter that time.)

From these decisions of this court, it is clear that the decision of the Ninth Circuit in this case, in which there is definite evidence that the defendant knew of his right to remain silent, would place restrictions upon state law enforcement procedures which this Court has heretofore refused to require, and that this decision, by imposing these restrictions, presents a question seriously affecting the "very essence of our federalism." *Hoag v. New Jersey*, 356 U. S. 464, 468 (1958).

One of the most important, if not the primary reason for the criminal law is to protect the public. It is, of course, essential in the administration of justice that no innocent person be convicted, and that oppressive and unfair methods be not used against even the obviously guilty person.

In equating these rights of the public to be protected by the criminal law, and the rights of the individual to be protected from coercion and oppressive methods in obtaining confessions which confessions are likely to be untrustworthy and lead

to the conviction of innocent persons, this court has amassed a large body of case law reflective of these principles. But, the principle evolving from the instant case, would depart from the principle of the trustworthiness of confessions and the protection of innocent persons from oppressive methods, and place in its stead a rule requiring that counsel be provided in all cases before questioning, in the absence of a waiver of counsel, resulting in the principle that the accused is entitled under "due process" to be aided in the preparation of defenses to the charges against him. Such a rule unbalances the equation of the principles that the public is entitled to be protected, and the innocent shielded from oppressive methods, and gives way to a principle that the accused is to be aided in his defense by sealing his lips through counsel in any pre-arraignment interrogation.

It is not difficult to envisage the devastating effect such a rule would have in eliminating the availability to law enforcement agencies of a vital and intrinsic aid to the solution of a great many crimes, in which there is lacking any physical evidence leading to the perpetrators of such crimes. Of course, as a result of the invocation of such a rule, the sum total of unsolved crimes would increase and the public's right to be protected under the criminal law would be commensurately diminished.

Therefore, we respectfully pray that the above-entitled court grant a writ of certiorari to review

the decision of the Circuit Court of Appeals for the Ninth Circuit rendered in this case on September 12, 1960.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General
of the State of Washington,

STEPHEN C. WAY,
Assistant Attorney General,

Attorneys for petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

HENRY M. GRIFFITH,
Appellant,

v.

B. J. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington,
Appellee.

No. 16,705

JUDGMENT

Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court with directions to accord the courts of the State of Washington a reasonable opportunity to retry Griffith, in the event of which the writ of habeas corpus shall be denied. Otherwise, it is to be granted. The District Court

shall enter an appropriate order further staying the execution.

(ENDORSED) Judgment
Filed and entered: September 12, 1960
FRANK H. SCHMID, Clerk.

HENRY M. GRIFFITH, *Appellant*, v. B. J. RHAY, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Appellee*.	No. 16705

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Hon. John J. O'Connell, Attorney General, State of Washington, counsel for the Appellee, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellee herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before December 10, 1960. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

(ENDORSED) Filed
October 7, 1960
FRANK H. SCHMID, Clerk
Dated: San Francisco, Calif.

(s) FREDERICK G. HAMLEY,
United States Circuit Judge.

UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

HENRY M. GRIFFITH, *Appellant*,	
v.	No. 16,705
B. J. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Appellee.*	Sept. 12, 1960

Appeal from the United States District Court for the Eastern District of Washington Southern Division

Before: ORR, HAMLEY and HAMLIN, Circuit Judges

HAMLEY, Circuit Judge:

Henry M. Griffith appeals from a district court order denying his application for a writ of habeas corpus. He is in the custody of the warden of Washington State Penitentiary under a death sentence following his conviction in the state court on a charge of murder in the first degree. The opinion of the district court is reported in 177 F.Supp. 386.

Griffith argues here that the district court erred

in rejecting his contention that he was deprived of due process of law in the state trial court proceedings. Specifically, it is urged that the trial court should not have received in evidence a signed confession obtained while Griffith was assertedly under the influence of drugs, and while he was without the assistance of counsel. Question is also raised concerning the manner in which the jury was required to function in evaluating the weight to be accorded this confession and testimony relative to certain oral admissions.

Griffith has not raised this latter question in any state court proceeding. Since he has failed to exhaust his state court remedies the district court and this court are without jurisdiction to grant relief on that ground, however meritorious it may be. See 28 U. S. C. A. § 2254.[1]

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[1]This ground primarily involves the manner in which testimony favorable to appellant was kept from the jury, while that which was against him was given in their presence. The trial judge ruled that a signed confession and the testimony concerning certain oral admissions were admissible. The jury, however, was instructed that in evaluating the "admissions" it should "consider all the facts and circumstances" in connection with the making of the admissions. Since this was the only instruction given on this subject we take it that in using the word "admissions" the court intended to include the signed confession which had been held to be admissible. As a matter of fact the so-called oral "admissions," to be described below, really constituted oral confessions. They were not confined to a statement of incriminating circumstances but were, as the state attorney general has told us here, "admissions of guilt."

But while the jury was instructed to consider surrounding circumstances in appraising the admissions, only those facts favorable to the state's position that the admissions were voluntary were testified to in front of the jury. All of appellant's evidence tending to show that the admissions were involuntary was received in the absence of the jury. Appellant questions how the jury could evaluate the admissions, having heard only the state's side of the evidence relating to voluntariness

Concerning the questions raised with regard to the voluntariness of the signed confession and the lack of counsel at the time it was given Griffith has exhausted the remedies available in the courts of Washington. He did so by raising these questions in a petition for a writ of habeas corpus filed in the Washington Supreme Court on May 25, 1959. That petition was denied on the same day, without hearing, in an unreported order. The Supreme Court of the United States thereafter denied a petition for certiorari to review this order. Griffith v. Rhay, 359 U. S. 1015, rehearing denied, 360 U. S. 941.[2]

The evidence summarized below is relevant to the questions pertaining to the signed confession. On October 4, 1956, A. B. Davis of Lind, Washington, was shot to death in a field near that city under circumstances which indicated murder. A prompt investigation led to the giving of a state alarm for the apprehension of Griffith as the suspected murderer.

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[2]Griffith had previously raised the question as to the voluntariness of the confession but not as to lack of counsel in his appeal to the Washington Supreme Court from the judgment of conviction. The question was decided against him. State v. Griffith, 52 Wn. 2d 721, 328 P. 2d 897, 901. But since Griffith did not thereafter apply for a writ of certiorari to review that decision it did not operate to exhaust Griffith's state remedies even with regard to the limited confession question there submitted. See Darr v. Burford, 339 U. S. 200, 214-219.

Griffith filed a second petition for a writ of habeas corpus in the Washington Supreme Court on July 16, 1959. This petition was also denied in an unreported opinion on the day it was filed. But this petition did not raise any question which Griffith here presents, and in any event certiorari was not applied for. Hence this second state habeas corpus proceeding is also without significance on the question of exhaustion of state remedies.

The district court opinion contains this statement concerning the background of Griffith, who was then nineteen years of age:

> "* * * He had received little formal education. His childhood was unhappy and insecure. His stay in foster homes was necessary because his father abandoned the family and his mother suffered a nervous breakdown, requiring her hospitalization. He was in the army and went AWOL after boot training. He was sent to the state reformatory for forgery, and was on parole from that institution when he was arrested and charged with the crime of which he now stands convicted. The emotional instability of petitioner is shown by the testimony of his witnesses at the trial."

Late on the night of October 6, 1956, two days after the murder, a man was found lying on the shoulder of a street in Spokane, Washington. He was suffering from a self-inflicted bullet wound in the abdomen. The Spokane County sheriff's office was notified. Deputy Sheriff Warren Adams and two other officers responded to the call. Adams identified the wounded man as Griffith. Griffith was taken by ambulance to Sacred Heart Hospital in Spokane.

Upon his arrival at the hospital in the early morning of October 7 Griffith was bleeding and in critical condition. Emergency surgery requiring from three and one half to four hours was per-

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[1]Over objection Adams and another officer were permitted to testify at the state trial concerning certain incriminating oral admissions or confessions made by Griffith while he was lying on the ground and later while he was being taken to the hospital.

formed. Griffith remained in a critical condition all of that day.

According to the testimony of Dr. William Albi who performed the operation, Griffith was in a "stuporous" condition the remainder of that day but he could feel pain. A catheter had been placed in his bladder to keep it drained. A tube had been placed in his nose to empty stomach secretions. Oxygen was administered, he received a transfusion of five pints of blood, and food was given intravenously using the arms alternately. He was also under sedation as described below.[1]

Griffith did not progress rapidly after the operation. Dr. Albi testified that his condition probably "regressed." Four additional serious operations were required, the first of these on October 24, 1956, and the last on December 2, 1956. According to the hospital report, one of these operations, which was for the removal of a kidney, was performed "because of the recurrent and steady loss of blood which kept the patient's condition constantly at low tide, seriously affecting his vitality, thinking and power to recuperate."

To relieve pain following the operation a narcotic and analgesic drug known as demerol was administered from time to time. Except for an initial

[1]Notwithstanding what Dr. Albi described as Griffith's "desperate" illness on that day, he was interrogated that afternoon, with the permission of the doctor, by a deputy sheriff using a wire recorder. The purported confession then obtained, a transcription of which was signed by Griffith two days later, was offered in evidence at the state trial, but was rejected by the court.

dose of 100 mgms, dosages of 75 mgms were given between October 7 and 15, 1956, as indicated in the margin. The initial effect of demerol is felt in five to fifteen minutes after injection, the maximum in one-half to two hours. No effect remains after three to three and one-half hours. The medical testimony concerning the effect these dosages of demerol had on Griffith is dealt with below.

Medication:	Demerol				
10- 7-56	1:00 A.M.	10- 8-56:	4:30 A.M.	10- 9-56:	12:15 A.M.
	7:00 A.M.				5:00 P.M.
	9:45 A.M.				11:00 A.M.
	1:30 P.M.				10:00 P.M.
	5:15 P.M.				
	9:00 P.M.				
10-10-56:	6:10 A.M.	10-11-56:	3:00 A.M.	10-12-56:	12:35 A.M.
	12:10 P.M.		2:25 P.M.		6:30 A.M.
	9:00 P.M.		6:10 P.M.		11:10 A.M.
			9:00 P.M.		3:15 P.M.
					9:30 P.M.
10-13-56:	6:15 A.M.	10-14-56:	1:00 A.M.	10-15-56:	6:45 A.M.
	12:30 P.M.		5:30 A.M.		11:40 A.M.
	4:30 P.M.		10:30 A.M.		4:15 P.M.
	8:30 P.M.		8:50 P.M.		9:30 P.M.

While at the hospital Griffith was guarded but not held incommunicado. He had nurses in attendance frequently. His doctor saw him twice a day. He was often visited by his mother and grandmother who were afforded the opportunity to advise him. At no time during this period did he have or request to have the services of an attorney. An information charging Griffith with the crime of murder in the first degree was filed against him on October 8, 1956.

The oral statements which were thereafter typed, signed and received in evidence as a confes-

sion were made by Griffith on the afternoon of October 11, 1956. At 3:00 o'clock that morning Griffith had been given 75 mgms of demerol to relieve lower abdominal pains. All of the tubes and attachments had been removed from Griffith except the tube which was necessary to continue intravenous feeding. It was noted on his hospital record that Griffith was having a "good day." However, a few minutes after 2:00 p.m. he again complained of abdominal pains. Before a further dosage of demerol could be given, the prosecuting attorney of Adams County in company with a stenographer and two detectives from the sheriff's office entered Griffith's hospital room, with the permission of the doctor, for the purpose of interviewing him. Before the questioning got underway, however, the nurse on duty asked them to step out of the room while she gave Griffith another 75 mgms of demerol. Five minutes later the questioning began.

The evidence is in dispute as to Griffith's condition at just this time. The nurse testified that he seemed drowsy, in quite a bit of pain, and "not real alert." Asked if Griffith responded to her questions the nurse stated, "Henry would shake his head and maybe say yes or no. He wouldn't answer long sentences. * * * If you said how do you feel, Henry, and maybe shook him he would respond in some way."

Detective James D. Allen, who was present during the interrogation on that day, testified that

Griffith was coherent and readily answered questions. Adams testified that Griffith's answers were responsive, and he was evidently aware of his surroundings and what was taking place. The stenographer testified to the same effect.

At the outset of the questioning the prosecuting attorney identified himself to Griffith, told Griffith that he was charged with murder in the first degree, and warned him that anything he said could be used against him. Griffith, however, was not told that he did not have to answer. Nor was he asked if he had an attorney or wished to consult an attorney, or that one would be provided without expense to himself if desired. Griffith did not request the services of an attorney.

A stenographic record of the interrogation was made. After being transcribed the written statement was taken to the hospital on October 15 by a notary public employed by the sheriff's office. She found Griffith in bed in a partially elevated position, smoking and reading. He was handed the statement to read and thereafter under oath signed it.

This written statement received in evidence over objection as state's exhibit 19 purports to be a complete confession of the crime, numerous details being given.[*] The answers given by Griffith, as

[*] When the state trial court ruled on this matter it had before it in addition to the evidence summarized above the testimony of Dr. Albi, referred to below, concerning the effect of demerol upon the mental powers and will of one under its influence. In holding that this signed confession was admissible (after excluding the previous signed confession on the ground that it was taken while

recorded in this statement, appear to be responsive to the questions and no lack of coherence is apparent. Griffith could not recall certain details. In response to seven different questions he said "I don't know," or words to that effect. This inability to recollect some details, however, may not have been caused by the demerol or Griffith's physical condition.

Three doctors testified as to the effect of demerol upon the ability of one, and especially a person in Griffith's then condition, to give a voluntary and reliable confession. One of these was Dr. Albi who testified at the state trial. The other two were Dr. H. M. Rodney and Dr. O. Charles Olson who testified at the district court hearing in this habeas corpus proceeding.

For the most part the doctors seemed to be in agreement that the reliability of Griffith's hospital confession was not affected by the fact that demerol had been administered a few minutes before. The doctors, however, were in sharp dispute as to whether under these circumstances one would be

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Griffith was under the influence of demerol) the court said in part:

> "Here the Prosecuting Attorney of Adams County was present, and an experienced man in taking confessions and statements of this nature. It is certain that he would not high pressure the man or do anything that was out of order in connection with taking this deposition. On the morning of the 11th he had no medication at all."

As previously noted, Griffith had not only been given 75 mgms of demerol at 3:00 o'clock that morning, but had been given a similar dose just five minutes before the questioning began. The prosecuting attorney of whom the trial judge spoke was not a witness but was actively in charge of the state's case at the trial. It was he who had offered in evidence the earlier signed confession which the court rejected because Griffith was "under the influence of opiates."

able to exercise his free will in deciding to give or to refrain from giving any statement.

Dr. Albi stated that one under the influence of demerol would be relieved of anxiety and would care less about what was going on. In his view demerol would make one sleepy and the "mind might be clouded." He expressed the opinion, however, that if one appeared to be alert, responded readily to questions, and displayed a good memory, that would indicate that he was not too much under the influence of the drug.

Dr. Olson testified that demerol induces a state of euphoria, which is a sense of well-being and happiness. In his opinion, however, use of the drug does not result in loss of volition. Nor does it, Dr. Olson testified, produce stupefaction or a hypnotic effect, and would not have affected the will of one in Griffith's circumstances. Dr. Olson apparently based this opinion to a considerable extent upon his examination of the confession. He pointed out that "it's coherent, it's intelligible, there were no lapses of consciousness apparent. He answered his questions directly and it appeared to me from reading the text that the man knew what he was talking about."

Dr. Rodney testified that the will of one under the influence of demerol is substantially impaired. It was his opinion that the general effect of this drug is more pronounced on a person weakened by injuries, and that psychopathic instincts are greatly accentuated by narcotics. Dr. Rodney also testified

that a person under the effect of demerol would not have the mental acuteness and stability of a normal person.

The only part of the evidence summarized above which was testified to in the habeas corpus proceedings is that consisting of the testimony of Dr. Rodney and Dr. Olson. All of the remaining evidence was before the district judge in the form of the transcribed record of the state criminal trial and the exhibits received at that trial. On the basis of all the oral and transcribed evidence the district court found that Griffith "was in full possession of his faculties at the time the statement of October 11, 1956, was taken."

The district court concluded that the earlier oral admissions and the signed confession which had been admitted into evidence "were the result of his free and voluntary act and were not obtained through the use of coercion, either physical or mental, or inducements consisting of promises of immunity, or duress, contrary to the due-process clause of the 14th Amendment * * *" The district court further concluded that Griffith was not deprived of due process of law by reason of the fact that he did not have an attorney to represent him prior to his arraignment by the trial court.

Appellant challenges the finding of fact and conclusion of law concerning the voluntary character of the signed confession. He also questions the con-

clusion of law with regard to the lack of legal assistance.

We turn to this second question. This being a capital case, the Due Process clause of the 14th Amendment accorded Griffith the right to the assistance of counsel in the state proceedings. Powell v. Alabama, 287 U. S. 45. The precise question is whether under that constitutional principle Griffith was entitled to the assistance of counsel at the time he was interrogated in the hospital room, and if so whether that right was denied to him.

In Crooker v. California, 357 U. S. 433, 438-440, it was held that apart from the question of the voluntariness of a confession state refusal of a request to engage counsel violates due process

> "* * * not only if the accused is deprived of counsel at trial on the merits, *Chandler v. Fretag, supra* [348 U. S. 3] but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.' *Lisenba v. California*, 314 U. S. 219, 236 (1941). Cf. *Moore v. Michigan*, 355 U. S. 155, 160 (1957). The latter determination necessarily depends upon all the circumstances of the case."

In our opinion Griffith was so prejudiced by not having the advice of counsel on the afternoon of October 11, 1956. No one told him at that time that he did not have to submit to interrogation. There is no testimony that he had previously been given this

information. Considering his youth and background, it could not reasonably be inferred that Griffith understood that he had the right to remain silent.

Had he been represented by an attorney on that occasion Griffith would without doubt have been advised that he need not talk. In view of his physical condition, the possible effect of the demerol, and the seriousness of the charge and penalty, such an attorney would probably also have advised him to refuse to talk. Considering the character of the statement Griffith gave to the officers, it is our opinion that his failure to have that advice infected his subsequent trial with an absence of "that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U. S. 219, 236.

In Crooker this test was applied but a contrary result was reached, due to the different circumstances of that case. Crooker was thirty-one years of age and a college graduate who had attended the first year of law school. On these facts the Supreme Court concluded that "he knew of his right to keep silent." As before stated, no such conclusion is warranted in our case. In Cicenia v. Lagay, 357 U. S. 504, while the defendant was denied access to his attorney during the period of his questioning he had previously employed counsel and was presumably advised of his rights.

As Justice Jackson said, concurring in Watts v. Indiana 338 U. S. 49, 58: "Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances."

The rule announced in Crooker refers to circumstances in which a defendant has requested counsel and such request has been refused. In our opinion, however, Griffith is to be regarded as in the same position as one who had made and been denied such a request.

Since Griffith had a right to the assistance of counsel on the afternoon of the interrogation, his failure to request such assistance has significance only if it amounted to a waiver of that right. But a waiver is an intentional relinquishment or abandonment of a known right or privilege. A waiver cannot be effected unless it is intelligently and competently given. Moreover, courts indulge every reasonable presumption against the waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U. S. 458, 464.

There is nothing in this record to indicate that Griffith knew that he had the right to the assistance of counsel on the afternoon in question. It follows that there is no support for a finding or conclusion that his failure to request counsel constituted a waiver of a known right. In addition the circumstances strongly indicate that even if Griffith then knew of his right to the assistance of counsel he was not in a physical and mental condition which would enable him to intelligently and competently waive that right. We so conclude and do so entirely apart from the question of whether he was then able to give a voluntary confession.

We hold that under the circumstances of this case the reception in evidence of a signed confession based on questioning conducted while Griffith was without the assistance of counsel and at a time when he had not declined such assistance, deprived him of due process of law within the meaning of the 14th Amendment. In the light of this holding the fact that the record contains other evidence of guilt which may be considered overwhelming is immaterial. See Malinski v. New York, 324 U. S. 401, 404.

The judgment is reversed and the cause is remanded with directions to accord the courts of the State of Washington a reasonable opportunity to retry Griffith, in the event of which the writ of habeas corpus shall be denied. Otherwise, it is to be granted. The district court shall enter an appropriate order further staying the execution.

(Endorsed) Opinion Filed Sept. 12, 1960.
Frank H. Schmid, Clerk.

In Evans v. Rives, D.C.Cir., 126 F.2d 633, 639, it was specifically held that in view of Johnson v. Zerbst failure to request counsel does not give rise to an inference of waiver.

We need not decide whether apart from such circumstances Griffith was in any event entitled to counsel at the time because the information charging murder had already been filed against him. See the concurring opinions in Spano v. New York, 360 U. S. 315. Nor need we decide whether the finding and conclusion that the confession of October 11, 1956, was voluntarily given is clearly erroneous and contrary to law.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

In the Matter of the Application for a Writ of Habeas Corpus of

HENRY M. GRIFFITH, *Petitioner*,

v.

B. J. RHAY, as Superintendent of Washington State Penitentiary at Walla Walla, Washington,

Respondent.

No. 1428

OPINION OF THE COURT

HONORABLE CHARLES L. POWELL, JUDGE

MR. R. MAX ETTER,
706 Spokane & Eastern Bldg.
Spokane, Washington,

Attorney for Petitioner.

HONORABLE JOHN J. O'CONNELL,
Attorney General, State of Washington,
Temple of Justice
Olympia, Washington,

By STEPHEN C. WAY,
Assistant Attorney General,

and

MR. GORDON SWYTER,
Prosecuting Attorney for Adams County,
County Courthouse,
Ritzville, Washington,

By EDWARD G. CROSS,
Deputy Prosecuting Attorney,

Attorneys for Respondent.

POWELL, District Judge

Petition for a writ of habeas corpus has been filed by Henry M. Griffith, a prisoner under sentence of death, confined within this district in the Washington State Penitentiary at Walla Walla County, Washington. He was convicted of murder in the first degree in the County of Adams, State of Washington, by a jury verdict rendered on March 6, 1957.

On appeal to the Supreme Court of the State of Washington, judgment of conviction was affirmed on August 7, 1958.[1] All of the judges sitting concurred in the opinion. A petition for rehearing was denied on October 7, 1958.

Thereafter, the petitioner here filed a petition with the Superior Court of the State of Washington for Adams County, requesting review and claiming that he had been denied due process of law. The petition was denied. Subsequent thereto, and on May 25, 1959, the petitioner here filed a petition for writ of habeas corpus in the Supreme Court of the State of Washington. The petition was denied without hearing by the Supreme Court on the same date.

Petition for certiorari was filed in the United States Supreme Court. Certiorari was denied on June 1, 1959.[2]

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[1] State v. Griffith, 52 Wn. 2d 721, 328 P. 2d 897.

[2] Griffith v. Rhay, 359 U. S. 1015.

Thereafter, and on July 16, 1959, the petitioner here filed a second petition for writ of habeas corpus in the Supreme Court of the State of Washington. The petition was denied on the same date.

Following the filing of the petition for writ of habeas corpus in this court, orders staying the execution of the petitioner were entered and the matter has now been submitted to this court for consideration upon the complete record of the trial, and appeal to the Supreme Court of the State of Washington.

Petitioner has been authorized to proceed here in forma pauperis.

The court appointed R. Max Etter, a capable attorney of the Spokane Bar and former assistant attorney general of the state, to present the petition and argument on behalf of the petitioner in this court.

Counsel for the respondent moved to dismiss the petition in part, claiming that the petitioner failed to exhaust his remedies in the state courts. An examination of the petition for writ of habeas corpus filed in the Supreme Court of the State of Washington, and a comparison of that petition with the one filed in this court, disclose that all of the grounds for relief stated here were raised in the prior petition. Petitioner has therefore exhausted his remedies in the state courts as required by 28 U. S. C. § 2254, and is entitled to maintain his peti-

tion here. The motion to dismiss is accordingly denied.

This court is required to determine the federal question presented here. The petition for writ of habeas corpus in this court is not a substitute for appeal.*

Petitioner contends that his constitutional rights were violated at the trial. The trial court admitted in evidence testimony concerning an oral statement, and also admitted an exhibit which was a statement signed by petitioner in which were admissions concerning his connection with the crime charged. He claims that the circumstances under which the statements were taken were such as to require their exclusion as being involuntary and coerced. He further contends that after the charge was filed against him he was not accorded rights guaranteed by the Fourteenth Amendment to the federal constitution, in that he was not immediately taken before a magistrate and was not given the benefit of counsel appointed by the court.

While the determination of the state court is not binding here, it is not to be disregarded. It is for this court to determine whether the petitioner has been accorded due process, or whether he has

*"The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution or the United States. 28 U. S. C. § 2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal." Brown v. Allen, 344 U. S. 443, at 485.

been denied rights guaranteed by the United Stat Constitution.[1] In the performance of that task the must be "an alert deference to the judgment of t state court * * *."[2]

The admitted facts are these: The petition was 19 years old when he was arrested. He had r ceived little formal education. His childhood w unhappy and insecure. His stay in foster hom was necessary because his father abandoned the fa ily and his mother suffered a nervous breakdown, r quiring her hospitalization. He was in the arm and went AWOL after boot training. He was se to the state reformatory for forgery, and was parole from that institution when he was arreste and charged with the crime of which he now stan convicted. The emotional instability of petition is shown by the testimony of his witnesses at t trial.

On October 6, 1956, at 11:30 p.m., petition was lying on a street in Spokane, Washington, suffe ing from a serious, self-inflicted, abdominal, gu shot wound. Police had orders to pick him up f questioning about the death of an oil dealer ne Lind, Washington. The deputy sheriffs who fou him proceeded to question him there and in the am bulance enroute to the hospital. Emergency surge was performed. Repeated blood transfusions we given. From the record it appears the petition

[1] Brown v. Allen, 344 U. S. 443, 455, 488.
[2] Malinski v. New York, 324 U. S. 401, 417.

received medical and hospital care that left nothing wanting. His hospitalization extended from October 6, to December 31, 1956, during which time several major operations were performed on him.

During that period the petitioner was on two occasions questioned by officers. On October 7, 1956, a recorded interview was taken. A typed transcript of that interview was offered in evidence and rejected. On October 11, 1956, the prosecuting attorney of Adams County, in company with a stenographer and two detectives, interviewed the petitioner in his hospital room. He at that time had been charged with murder by an information filed in the Superior Court of Adams County. He was not represented by an attorney. He did not ask for an attorney. He had not been taken before a committing magistrate.

At 2:25 p.m. on October 11, the nurse had administered to petitioner an injection of 75 mgs. of demerol to relieve pain. Questioning of the petitioner began at 2:30 p.m. That interview was recorded and later typed and taken to the hospital by a notary on October 15, 1956. She found the petitioner in bed in a partially elevated position, smoking and reading. Petitioner was handed the statement to read and thereafter, under oath, signed it. The statement was received in evidence as the state's Exhibit 19. This statement, petitioner contends, should have, under all the circumstances, been rejected on the ground that it was coerced.

During the times referred to, the petitioner was a bed patient in the Sacred Heart Hospital in Spokane, Washington. He was not held incommunicado, although he was guarded. He had nurses in attendance frequently. His doctor saw him twice a day. He received visitors.

At the trial petitioner testified briefly, in the absence of the jury, concerning the questioning that resulted in his oral statement. He stated he had no recollection of it. He did not testify about the statements made on October 7 and 11, 1956, and did not take the stand in his own defense.

Petitioner was arraigned on January 4, 1957, before the Superior Court of Adams County, Washington on the information filed against him there. No proceedings were conducted in court until an attorney had been appointed to represent him. Thereafter, he entered a plea of not guilty, and a special plea of not guilty by reason of insanity.

At the trial, evidence of the officers was received concerning the taking of the statements of petitioner. The record shows the State's evidence was introduced in the presence of the jury. No objection was made to this procedure by petitioner's trial counsel. The court instructed the jury on the weight to be given statements of petitioner.[1]

[1] INSTRUCTION NO. 17—Admissions made by a defendant charged with crime, when such admissions are not caused by duress or fear produced by threats, are to be considered by the jury in connection with all the other evidence in the case in determining the guilt or innocence of the accused, and their weight, as evidence

The petitioner's arraignment was delayed until his discharge from the hospital.[6] Under the Washington statutes the appointment of counsel is to be made at the time of arraignment.[7]

Counsel for petitioner argues that the failure to arraign petitioner and to provide counsel for him, at an early date, has deprived him of his constitutional rights. Counsel must be provided to conduct the trial.[8] There is no such general requirement as to investigative stages.

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like that of any other fact, is to be determined by you alone. If you find any such admissions have been made in this case, you have a right, in weighing such testimony, to consider all the facts and circumstances connected therewith, together with the defendant's interest, if any, in the transaction, and his knowledge, if any he had, of the circumstances, which may throw any light upon, or aid you in weighing such testimony."

[7] RCW 10.40.010 Time [illegible] [Arraignment]. When the indictment or information has been filed the defendant, if he has been arrested, or as soon thereafter as he may be, shall be arraigned thereon before the court.

RCW 10.40.070 Counsel assigned to indigents. If the defendant appear without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and he shall be asked if he desire the aid of counsel, and if it appear that he is unable to employ counsel by reason of poverty, counsel shall be assigned to him by the court.

RCW 10.01.110 Counsel—Right to—Fees. Whenever a defendant shall be arraigned upon the charge that he has committed any felony, and shall request the court to appoint counsel to assist in his defense, and shall by his own oath or such other proof as may be required satisfy the court that he is unable, by reason of poverty, to procure counsel, the court shall appoint counsel, not exceeding two, for such defendant * * *

[8] "* * * We have many times repeated that not only does due process require that a defendant, on trial in a state court upon a serious criminal charge and unable to defend himself, shall have the benefit of counsel, compare *Williams v. Kaiser*, *supra* [323 U. S. 471], *Tomkins v. Missouri*, 323 U. S. 485 and *Rice v. Olson*, *post*, p. 786 [324 U. S.], with *Betts v. Brady*, 316 U. S. 455, but that it is

An application for writ of habeas corpus following a state court conviction is to be treated differently from that following a federal court conviction. The delay in arraignment and in appointment of counsel in a state court case are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial, through the use of a coerced confession or otherwise.

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a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel. *Powell v. Alabama*, 287 U. S. 45; *Avery v. Alabama*, 308 U. S. 444; *Ex parte Hawk*, 321 U. S. 114, 115-116; *House v. Mayo*, *supra* [324 U. S. 42]." *White v. Ragen*, 324 U. S. 760, 763-764.

"The decision and judgment below determine for us that under the law of Nebraska such detention and examination, without appearance or arraignment, do not require exclusion of the confessions or plea as involuntary. The rule of the *McNabb* case, considered recently in *United States v. Carignan*, 342 U. S. 36, is not a limitation imposed by the Due Process Clause. *McNabb v. United States*, 318 U. S. 332, 340; *Lyons v. Oklahoma*, 322 U. S. 596, 597, note 2. Compliance with the *McNabb* rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. That power over state criminal trials is not vested in this Court. A confession can be declared inadmissible in a state criminal trial by this Court only when the circumstances under which it is received violate those 'fundamental principles of liberty and justice' protected by the Fourteenth Amendment against infraction by any state." *Gallegos v. Nebraska*, 342 U. S. 55, 63-64.

"* * * When this Court is asked to reverse a state court conviction as wanting in due process, illegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial, either through the use of coerced confession or otherwise. *Lisenba v. California*, *supra* [314 U. S. 219], at 234, 235, 240; *Lyons v. Oklahoma*, *supra* [322 U. S. 596] at 597, n. 2; *Gallegos v. Nebraska*, 342 U. S. 55, 59, 65 (1951). Upon the facts of this case, we cannot hold that the illegal conduct of the law enforcement officers in not taking petitioner promptly before a committing magistrate, coerced the confession which he made in the District Attorney's office or in any other way deprived him of a fair and impartial trial." *Stroble v. California*, 343 U. S. 181, at 197.

In Crooker v. California, 357 U. S. 433, the defendant repeatedly asked for, and was refused the right to, counsel. The defendant Crooker was educated and was well aware of his constitutional rights. After repeated questioning he finally confessed, and later claimed his confession was coerced. In rejecting his claim, the majority of the Court in that case said (pp. 437-438):

> "The bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained. *Brown v. Allen*, 344 U. S. 443, 476 (1953). Neither does an admonition by the police to tell the truth, *Sparf v. United States*, 156 U. S. 51, 55-56 (1895), nor the failure of state authorities to comply with local statutes requiring that an accused promptly be brought before a magistrate. *Fikes v. Alabama*, 352 U. S. 191 (1957).
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> "Petitioner's claim of coercion, then, depends almost entirely on denial of his request to contact counsel. This Court has not previously had occasion to determine the character of a

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"To delay arraignment, meanwhile holding the suspect incommunicado, facilitates and usually accompanies use of 'third-degree' methods. Therefore, we regard such occurrences as relevant circumstantial evidence in the inquiry as to physical or psychological coercion. As such, it was received and the jury was instructed to consider it in this case. But the petitioners' contention here goes farther—it is that the delayed arraignment compelled the rejection of the confessions.

"Petitioners confuse the more rigid rule of exclusion which, in the exercise of our supervisory power, we have promulgated for federal courts with the more limited requirements of the Fourteenth Amendment. This, we have held, did not impose rules of evidence on state courts which bind them to exclude a confession because, without coercion, it was obtained while a prisoner was uncounseled and illegally detained. *Stroble v. California*, 343 U. S. 181, 197; *Lisenba v. California*, 314 U. S. 219." *Stein v. New York*, 346 U. S. 156, at pp. 187, 188.

> confession obtained after such a denial. But we have held that confessions made by indigent defendants prior to state appointment of counsel are not thereby rendered involuntary, even in prosecutions where conviction without counsel would violate due process under the Fourteenth Amendment. *Brown v. Allen*, 344 U. S. 443, 474-476 (1953); *Stroble v. California*, 343 U.S. 181, 196-198 (1952); *Gallegos v. Nebraska*, 342 U. S. 55, 64-68 (1951)."

In this case petitioner at no time requested the services of an attorney prior to his appearance in court for arraignment. He was regularly visited by his mother and grandmother, and they were afforded opportunity to advise him. Furthermore, he was physically unable to appear in court for an early arraignment. The lack of counsel in the early stages of the case, as has heretofore been pointed out, is a circumstance to consider in determining if due process has been accorded. There is no evidence of the denial of any request by petitioner for counsel.

In the case of Cicenia v. Lagay, 357 U. S. 504, at page 509, et seq., the Court, concerning the right to counsel in criminal cases, states:

> "The difficulties inherent in the problem require no extensive elaboration. Cf. *Watts v. Indiana*, 338 U. S. 49, 57-62 (opinion of Jackson, J.). On the one hand, it is indisputable that the right to counsel in criminal cases has a high place in our scheme of procedural safeguards. On the other hand, it can hardly be denied that adoption of petitioner's position would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases. A satisfactory formula for recon-

ciling these competing concerns is not to be found in any broad pronouncement that one must yield to the other in all instances. Instead, as we point out in *Crooker v. California*, *supra* [357 U. S. 433], this Court, in judging whether state prosecutions meet the requirements of due process, has sought to achieve a proper accommodation by considering a defendant's lack of counsel one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness. See *House v. Mayo*, 324 U. S. 42, 45-46; *Payne v. Arkansas*, 356 U. S. 560, 567.

"In contrast, petitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved. Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel. Even in federal prosecutions this Court has refrained from laying down any such inflexible rule. See *McNabb v. United States*, *supra* [318 U. S. 332]; *Mallory v. United States*, 354 U. S. 449. * * *"

There is no claim that the statements of petitioner here were exacted by physical violence, threats, or inducements consisting of promises of immunity. Counsel for petitioner argues that the Spano case considered by the Supreme Court[1] is parallel to the one here under consideration. There, Spano, under indictment, and apparently in good health, was delivered into custody by his attorney who cautioned him to answer no questions. Thereafter, from 7:15 p. m. to 6:00 a. m. of the following

[1] Spano v. New York, 360 U. S. 315.

day, he was repeatedly questioned, refused access to his attorney, and through sympathy for a friend on the police force (who falsely represented himself in trouble because of the defendant), was finally induced to make a confession.

Here, the petitioner Griffith was questioned when he was first arrested, and was immediately taken to a modern hospital. The hospital records, Defendant's Exhibit 20, show repeated calls on him by nurses and relatives. He was not threatened or subjected to prolonged questioning.

Petitioner, as has been previously noted, testified in the absence of the jury that he had no recollection of the officers first questioning him. While a faulty recollection may thwart cross-examination, it is hardly a refutation or explanation of the direct testimony of adverse witnesses.

The two officers present, William C. Seitz and Warren Adams, testified concerning petitioner's physical and mental condition when he was first arrested, that he was suffering pain, but that he was coherent and responded freely to questions asked.[1]

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[1]Officer Adams testified (ST 260):

"A. When I arrived he had one blanket over him. I got another blanket and put over him. I asked him how he felt. He said, not too bad. I said, are you in a great deal of pain. He said, no, it just burns. I checked the wound, and it wasn't bleeding too badly.

"Q. Did he respond to your questions freely?

"A. Yes, very freely.

"Q. Had he at any time become incoherent?

"A. No, he talked freely all the way while he was laying and waiting on the ambulance, and on the way to the hospital.

The petitioner contends that because the questioning by the prosecuting attorney, which resulted in State's Exhibit 19, was started five minutes after the injection of 75 mgs. of demerol, that statement was not a voluntary one. The doctor who treated the petitioner, Dr. Albi, testified at the trial concerning the nature and properties of demerol. In addition, two doctors testified at the hearing on the petition here under consideration. There is some conflict in the testimony.

Demerol is a narcotic drug. It is obtainable by prescription only. It is habit forming and patients build up a tolerance for it. It is an analgesic and a sedative, given to alleviate pain. Dosages range normally between 50 and 200 mgs. Its initial effect is felt in 5 to 15 minutes after injection; the maximum, in one-half to two hours; and no effects remain after three to three and one-half hours.

Dr. Albi in his testimony described it as being

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and on the way to the hospital and when he got there in the hospital.

"Q. Do you believe, Officer Adams, at this time that the defendant was in his right mind? Was he absolutely all right to be answering questions of this nature?

"A. I definitely do. I believe he knew what he was saying, and although he was in pain, and he had to be in pain to receive a wound like that, but I firmly believe he knew what he was saying, and he was telling me the truth." (ST 270)

Officer Seitz testified (ST 272):

"Q. During the time that you were present at these questions, did you observe the condition of the defendant?

"A. Yes, I did.

"Q. Did he respond readily to the questions?

"A. Yes, he did.

"Q. Did he seem coherent?

"A. At the time, yes."

a narcotic and analgesic, and stated that the effects produced by it could be compared to those produced by intoxicants.[11]

The testimony further is that if he were affected by demerol to such an extent as to be unresponsive, petitioner would be sleepy, drowsy, and inattentive. An examination of the statement, State's Exhibit 19, indicates that such was not the condition of petitioner. The length of questions and the nature of the answers would indicate that petitioner had possession of his faculties at the time the statement was taken.

Doctor Albi, though at first reluctant to do so, gave his consent, after a lapse of two or three days, to the officers to interview.[12]

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[11] "A. Well, demerol is one of the class of drugs that is known as narcotic and analgesic. That means it would bring on sleep, and it will also stop pain. I think that is what the words would indicate.

"Q. Yes. Well, Doctor, how does demerol affect a person, or I will ask you how does demerol affect a person in the defendant's condition at that time?

"A. Well, I think it would tend to do away with anxiety. It would tend to relax one. It would tend to stop the pain." (ST 329)

On cross-examination the doctor testified:

"Q. To get it into something a little more understandable, isn't it similar to drinking intoxicating liquor in varying degrees?

"A I think it could be compared to that." (ST 451)

[12] "Q. As you recall, for the first two or three days after this first operation you disapproved of someone going in to take a statement from him, did you not?

"A. I believe so. I am not absolutely certain about this, but I asked him not to disturb him while his oxygen was going, and so forth.

"Q. By the way, after that two or three day period, I take it you don't remember the exact length?

In further testifying, the doctor stated the indication would be that if answers of persons under the influence of demerol were normal and responsive, they would be in retention of their mental faculties."

A similar problem was before the United States Court of Appeals for the Ninth Circuit in Palakiko v. Territory of Hawaii, 188 F. 2d 54. The defendant there was given phenobarbital. A physician testified defendant would be sleepy, but would awaken at intervals and be able to think and talk. His confession, the court held, was not coerced when obtained during that period. Judge Pope stated at page 58, "But the best evidence of Majors' then mental condition is the statement itself."

The same case was again before the Court of Appeals in Palakiko v. Harper, 209 F. 2d 75. The statement of Majors was again held not the result of "psychological coercion."

"A. No.

"Q. And incidentally, you were contacted several times during those days?

"A. I think I was contacted twice.

"Q. Then after those two or three days you did give your approv[illegible] is that right?

"A. Yes, sir." (ST 454)

""Q. I mean if their [persons under influence of drug such as demerol] answers were responsive, that would mean they were in possession of some of their faculties; wouldn't it?

"A. I should think so.

"Q. If they showed a good memory and were able to recall events more or less normally, that would indicate retention of their mental faculties?

"A. I would say if their responses sounded all right, I guess it would. That would be some indication that they were all right I guess." (ST 338)

Statements taken from prisoners who are intoxicated are not excluded as evidence."

If the effect of demerol is comparable to intoxication, the statement here would appear to be admissible without question.

The trial court, without objection from petitioner's counsel, permitted the State's witnesses to testify to the circumstances of the taking of the two statements in the hospital. Generally, what is said here of the second statement which was admitted in evidence, applies to the first one, which the court rejected. The evidence does not show such conduct as to evidence coercion. The instruction on admissions,

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"'"A confession otherwise voluntary is not to be excluded because the accused was intoxicated when he made it. The fact that the confessor was intoxicated is a circumstance affecting its credibility, and is to be considered by the jury. It is immaterial that the liquor was furnished to the confessor by the officer having him in custody.

"If the intoxication of the confessor produced actual mania, or rendered the confessor unconscious of what he was saying, his confession is inadmissible. However, the fact that the accused had but recently recovered from delirium tremens will not render a confession inadmissible." 2 Wharton's Criminal Evidence 122, § 388. (12th Ed.)

"The trial court admitted testimony of a police officer concerning admissions made to him by appellant after his arrest. Its admissibility is challenged on the ground that when appellant was questioned 'he was nervous and jittery, was very much under the influence of liquor * * * the police did not at any time warn him whatever he said would be used against him, or even tell him that he was charged with any crime; and therefore he had no reason to think that he needed counsel.' These facts, assuming their correctness, did not render the admissions inadmissible. Even a confession, given under such circumstances, would have been admissible. The rules governing the reception in evidence of admissions are much less onerous than those concerning confessions. There was no reason for an instruction as to the difference between an admission and a confession." Morton v. United States, 147 F. 2d 28, 31.

and the weight to be given them, would not be improved by asking the jury to pass on their character. It was the duty of the court, not the jury, to pass on their admissibility.

For the reasons given, the petition is denied.

Dated this 30th day of September, 1959.

CHARLES L. POWELL,
United States District Judge.